No. 03-701

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES S. DEATON, *et ux.*

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF REALTORS, REAL ESTATE ROUNDTABLE, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, NATIONAL ASSOCIATION OF INDUSTRIAL & OFFICE PROPERTIES, NATIONAL MULTI HOUSING COUNCIL, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, ASSOCIATED BUILDERS & CONTRACTORS, AND NATIONAL APARTMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This case presents the question whether a shallow roadside ditch, situated at the highest point on the Delmarva Peninsula eight miles away from any truly navigable water, is nonetheless a federal "navigable water" under the Clean Water Act simply because rainfall might "eventually flow" from that ditch in a downstream direction. This question has divided the Circuits.

In the decision below, the Fourth Circuit approved the U.S. Army Corps of Engineers' jurisdiction over a rural roadside ditch and nearby wetlands because water might "eventually flow[]" from the ditch to distant navigable waters. Pet. App. 20a. The Fifth Circuit has held that "this definition is unsustainable under" Fifth Circuit law and this Court's decision in *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001). See *United States* v. *Needham (In re Needham)*, No. 02-30217, 2003 WL 22953383, at *3 (5th Cir. Dec. 16, 2003).

The questions presented are:

1. Whether the roadside ditch and the wetland next to it are "navigable waters" under the Clean Water Act?

2. Whether Congress' commerce power over navigation allows the federal regulation of the remote wetland or roadside ditch?

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STATEMENT OF INTEREST

Amici Curiae are organizations representing a wide variety of individuals and entities that own, develop, purchase, sell and improve land in each of the 50 States.[1] These individuals and entities hold and control land as owners and managers of residential and commercial property; facilitate the purchase and sale of land as real estate brokers and agents; and work the land as contractors, construction supervisors, equipment operators and laborers. Under the Clean Water Act ("CWA"), if they or their clients propose to authorize or engage in activities involving the movement of earth in federal "navigable waters" (rather than on land or in the waters of the States), they must first obtain a permit from the U.S. Army Corps of Engineers (the "Corps"). See 33 U.S.C. § 1344(a). *Amici* have a substantial interest in the establishment of proper and predictable boundaries to the Corps' geographic jurisdiction under the CWA.

Amici are gravely concerned that the Fourth Circuit's decision allows the Corps to subject businesses and individuals to expansive, unjustifiably expensive and legislatively unauthorized assertions of federal civil and criminal jurisdiction. The decision below approved the Corps' claim of jurisdiction far upstream of truly navigable waters, through the non-navigable tributaries and to the tip of every ditch and rivulet in the nation. This decision extends federal regulatory authority far beyond the letter and intent of the CWA into the realm of state and local authority over land and water use. At the same time, through an expansive

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[1] No person or entity other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part. Sup. Ct. R. 37.6. The parties have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court. *Id.* 37.3.

application of judicial deference to the Corps, the Fourth Circuit's decision eliminates the federal courts as a check on that agency's expansion of its own power and sacrifices important protections for individual liberty. These holdings present important questions of federal law; they are inconsistent with this Court's decision in *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"); and they conflict with the decisions of another court of appeals.

The interests of the individual *amici* are as follows:

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation") is a nonprofit, public interest law firm established to protect the rights of America's small-business owners. The NFIB Legal Foundation is also the legal arm of the National Federation of Independent Business ("NFIB"), the nation's oldest and largest organization dedicated to representing the interests of small-business owners. The approximately 600,000 members of NFIB own a wide variety of America's independent businesses, including over 20,000 construction firms and over 8,500 homebuilders. The NFIB Legal Foundation is concerned that the Fourth Circuit's decision will dramatically increase costs of regulatory compliance and expose small businesses and their owners to civil and criminal penalties for engaging in ordinary and everyday activities.

The National Association of Realtors ("NAR") is a non-profit professional association of persons in the real estate industry. NAR's members include nearly one million professionals involved in all aspects of the real estate profession. NAR is a champion of the rights and interests of real property owners throughout the country.

The Real Estate Roundtable ("Roundtable") brings together leaders of the nation's top public and privately-held real estate ownership, development, lending and management firms with the leaders of national real estate trade associations

to address key national policy issues relating to real estate and the economy, including environmental and land use issues. Collectively, Roundtable members hold portfolios containing over five billion square feet of developed property valued at more than $450 billion. Participating trade associations represent more than one million people involved in virtually every aspect of the real estate business.

The Associated General Contractors of America ("AGC") is the oldest and largest national trade association in the construction industry. A nonprofit corporation founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 33,000 firms in more than 100 chapters throughout the United States. AGC's members include more than 7,000 of the nation's leading general contractors, 12,000 specialty contractors, and 14,000 material suppliers and service providers to the construction industry. AGC members construct commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities and multi-family housing units; and they prepare sites and install the utilities necessary for housing development. AGC members engage every day in dredge-and-fill activities in waters and wetlands. Whether those activities require a permit from the Corps depends upon statutory terms that agencies and courts have found difficult to construe. The resulting uncertainty over the scope of federal jurisdiction has unfairly exposed contractors to the risk of civil and criminal liability under the CWA.

The National Association of Industrial and Office Properties ("NAIOP") is the nation's leading organization of developers of, investors in and owners of commercial real estate. NAIOP helps its over 100,000 members to create, protect and enhance the value of commercial and industrial real estate and promotes grassroots public policy initiatives related to real estate development.

The National Multi Housing Council ("NMHC") represents the largest and most prominent apartment firms in the United

States. NMHC's members are engaged in all aspects of the apartment industry, including ownership, development, management, and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research and promotes the desirability of apartment living.

The International Council of Shopping Centers ("ICSC") is the premiere global trade and professional association of the retail real estate industry. ICSC's more than 44,000 members include shopping center owners, developers, managers, marketing specialists, investors, retailers and brokers, as well as academics and public officials. The principal aims of ICSC are to advance the development of the shopping center industry and to establish the individual shopping center as a major institution in the community.

Associated Builders and Contractors, Inc. ("ABC") is a national trade association of more than 23,000 construction contractors and related firms. The members of ABC and the hundreds of thousands of construction supervisors, equipment operators and laborers they employ must deal every day with the Corps' regulatory permitting program and have a deep interest in ensuring that the agency operates within predictable and statutorily authorized bounds.

The National Apartment Association ("NAA") is the largest national federation of state and local apartment associations. NAA is comprised of 155 affiliates and represents more than 30,000 professionals who own and manage more than 4.5 million apartments.

REASONS FOR GRANTING THE PETITION

Petitioners' unfortunate experience could have happened to any property owner or contractor in the nation. This case began nearly 14 years ago, when James and Rebecca Deaton dug into the earth in a low spot on their property that a Corps field inspector classified as a "wetland." Pet. 1. Of critical importance, the Corps classified the low spot as a *federal*

wetland, or "navigable water," even though the property lies miles from the nearest truly navigable water and even though the Corps has not been able to show that the Deatons' digging ever affected that distant waterway. See *id.*

The Corps' rationale for asserting federal jurisdiction has changed over the course of this litigation. See *id.* at 7, 27. In its present incarnation, the Corps contends that the low spot on the Deatons' property is "adjacent" to a "tributary" to navigable waters. See 33 C.F.R. § 328.3(a)(1), (5), (7) (defining the Corps' jurisdiction to include truly navigable waters, non-navigable tributaries and wetlands adjacent to each). This so-called "tributary" is nothing more than a roadside ditch located next to the Deatons' property, which usually holds less than an inch of water and is often entirely dry. (A photograph of this roadside ditch is attached in the appendix at 1a.) The roadside ditch is connected by a culvert to a larger ditch system maintained by a local public drainage association, or "PDA." See Pet. 5. The PDA's ditch system eventually connects to the Wicomico River, which first becomes navigable over eight miles away from the Deatons' property. See *id.*

Despite these tenuous connections, the Fourth Circuit accepted the Corps' contention that the roadside ditch was the sort of "water" that Congress authorized the Corps to regulate. According to the court, the Corps may properly assert federal jurisdiction over "any branch of a tributary system that *eventually flows* into a navigable body of water," Pet. App. 20a (emphasis supplied), including such remote channels as the roadside ditch. Moreover, rather than assess whether Congress specifically authorized the Corps to assert federal jurisdiction over such remote roadside ditches, the Fourth Circuit simply deferred to the Corps' claim of jurisdiction. *Id.* at 20a-22a. According to the court, no independent inquiry into Congress' intent to regulate so far from the navigable waters was necessary. It was enough that the Corps had declared the roadside ditch to be a "tributary."

Id. at 20a (citing *Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837 (1984)).

The Fourth Circuit's decision raises issues of substantial importance. First, the jurisdictional theory it employs is breathtakingly sweeping. Under the Corps' "eventually flows" theory, every ditch and swale in the nation is a federal water, because every ditch and swale "eventually flows" through some series of connections "into a navigable body of water." Pet. App. 20a. This extension of federal civil and criminal authority has enormous implications for countless small businesses, property owners, developers and contractors across the country.

Second, the deference the Fourth Circuit gave the Corps eliminated any check on the Corps' jurisdictional ambitions and left the scope of federal CWA jurisdiction to the unfettered whim of the agency. The Corps' assertion of federal power—which pushes the boundaries of federal authority, encroaches upon the traditional realm of the States and carries the sanction of the criminal law—does not warrant deference. Instead, to protect against arbitrary and unauthorized deprivations of individual liberty, a more searching judicial review is required.

For these reasons, the Fourth Circuit's holding and approach cannot be squared with this Court's decision in *SWANCC*. Just three years ago, this Court held that the Corps' jurisdiction under the CWA is not unlimited and rejected the Corps' claim of jurisdiction over isolated wetlands under the so-called "Migratory Bird Rule." In so holding, this Court declared that Congress' use of the term "'navigable waters'" *limited* the scope of federal CWA jurisdiction. *SWANCC*, 531 U.S. at 172 (quoting 33 U.S.C. § 1344(a)). Moreover, this Court declined to defer to the Corps' broad jurisdictional theories. Instead, this Court demanded a clear statement that Congress itself authorized the Corps' expansive claims. *Id.* at 173-74. The Fourth Circuit ignored this clear statement rule and deferred to the

Corps' efforts to continue (even after *SWANCC*) to assert the broadest possible jurisdiction for itself.

Finally, the Fourth Circuit's decision conflicts with the law of another circuit. In sharp contrast to the "eventually flows" theory set forth in the decision below, the Fifth Circuit has held that federal CWA jurisdiction extends only to waters that are "actually navigable or . . . adjacent to an open body of navigable water." *Rice* v. *Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001).[2] The split deepened with the Sixth Circuit's decision in *United States* v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, No. 03-929 (U.S. filed Dec. 22, 2003), which adopted the Fourth Circuit's approach. The split is also entrenched. After the Petition was filed in this case, the Fifth Circuit reaffirmed its holding in *Rice* and expressly rejected the opinions of its sister circuits, including the decision below. See *United States* v. *Needham (In re Needham)*, No. 02-30217, 2003 WL 22953383, at *3 (5th Cir. Dec. 16, 2003) (describing the definition approved in *Deaton* and *Rapanos* as "unsustainable under *SWANCC*"). This Court's intervention is sorely needed to bring uniformity to this important federal regulatory scheme.

I. THE CORPS OF ENGINEERS' SWEEPING THEORY OF FEDERAL JURISDICTION WILL HAVE A SUBSTANTIAL ADVERSE IMPACT ON SMALL BUSINESSES, PROPERTY OWNERS AND CONTRACTORS NATIONWIDE.

The Corps' sweeping jurisdictional theory will affect millions of small businesses, property owners, contractors and developers across the nation. Under the Corps' theory, the Deatons' digging required a federal permit because their property is "adjacent to" a shallow, man-made, roadside ditch, which is ultimately connected and "eventually flows" through a chain of culverts and other ditches to a river eight

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[2] *Rice* involved the Oil Pollution Act of 1990 ("OPA"), which uses the CWA's definition of "navigable waters." *See Rice*, 250 F.3d at 267-68.

miles away. This is an unlimited theory of federal jurisdiction.

As a matter of basic hydrology, water flows downhill; and virtually all of the habitable land in the nation can be linked through some chain of connections to a distant navigable water. In short, the Corps purports to rely on the CWA's authorization of jurisdiction over the "navigable waters" to federalize virtually all ditches, all waters and all wetlands in the nation. Like the Deatons' property, many of these remote channels and "wetlands"[3] have no water in sight and are not recognizable as "waters" at all. (Photographs of remote channels and ditches over which the Corps has asserted jurisdiction are attached at 2a through 4a.[4])

This professed expansion of jurisdiction will subject countless new activities to the Corps' cumbersome permitting process. Under § 404 of the CWA, any person who "discharge[s] dredged or fill material" into a "navigable water" must first obtain a permit from the Corps. 33 U.S.C. § 1344(a). The Corps has defined the "discharge [of] dredged or fill material" extremely broadly, to apply to all sorts of

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[3] The Corps uses a technical process to identify areas containing "wetlands." *See* U.S. Army Corps of Engineers, *Corps of Engineers Wetlands Delineation Manual* (Jan. 1987), *available at* http://www.saj.usace.army.mil/permit/documents/87manual.pdf. "Where wetlands are adjacent to open water"—such as those at issue in *United States* v. *Riverside Bayview Homes, Inc.*, which "actually abut[ted]" a navigable waterway, 474 U.S. 121, 135 (1985)—"they generally constitute the transition to upland." 40 C.F.R. § 230.41(a)(2). Of course, the wetlands at issue in this case are not adjacent to an open body of water.

[4] These photographs were presented with the testimony of Robert J. Pierce, Ph.D., before the Senate Committee on Environment & Public Works. *See Current Regulatory and Legal Status of Federal Jurisdiction of Navigable Waters Under the Clean Water Act, In Light of the Issues Raised by the Supreme Court in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (SWANCC): Hearing Before the Senate Comm. on Env't and Pub. Works, Subcomm. on Fisheries, Wildlife and Water*, 108th Cong. (June 10, 2003).

ordinary activities involving the movement of dirt. For example, the Corps generally requires permits for "land-clearing," "ditching" and "earth-moving" by "mechanized earth-moving equipment," absent "project-specific evidence" that no permit is required. 33 C.F.R. § 323.2(d)(2)(i). The Corps has required permits for plowing on agricultural land. See *Borden Ranch P'ship* v. *United States Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001), *aff'd by an equally divided Court*, 537 U.S. 99 (2002) (per curiam). The Corps has required permits for "sidecasting," or "the deposit of dredged or excavated material from a wetland back into that same wetland." *United States* v. *Deaton*, 209 F.3d 331, 335 (4th Cir. 2000). The Corps has required permits for residential construction impacting an area "about half the size of a ping-pong table." Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* ix (1994). The Corps has even suggested that it has jurisdiction over "[a]ctivities such as walking, bicycling or driving a vehicle through a wetland," declining only in its "discretion" to exercise the authority it claims to have been delegated. Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993). As the Corps expands its geographic reach to ever smaller ditches and channels and the wetlands adjacent to them, more and more of these ordinary activities will require federal approval.

This federal approval process is complex, rivaling that of any local planning board. The Corps reviews individual dredge-and-fill permit applications for compliance with specific technical guidelines promulgated under § 404(b)(1) of the CWA (the "404(b) Guidelines," codified at 40 C.F.R. Part 230). The Corps also subjects each permit application to a "public interest review." See 33 C.F.R. § 320.4. The Corps considers "all factors" in this plenary review, including such concerns of the general police power as:

> conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and

> wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

Id. § 320.4(a)(1). The Corps' "general permit" process—an ostensibly "streamlined" permitting process for smaller and simpler projects—also requires advance notice to the Corps, as well as compliance with detailed requirements set forth in 70 pages of the Federal Register, including such land-use practices as the provision of vegetated buffer zones. See 67 Fed. Reg. 2020 (Jan. 15, 2002). If the Corps rejects an individual or general permit application, the project cannot go forward, regardless of the opinions of state and local authorities. See *SWANCC*, 531 U.S. at 162-65 (project sponsored by 23 suburban Chicago cities and villages and approved by all necessary state and local authorities, including the Cook County Board of Appeals, the Illinois Environmental Protection Agency and the Illinois Department of Conservation, but rejected by the Corps).

The extension of this permitting process to a multitude of new construction and development activities will have a substantial economic impact. According to one study, the average time to prepare a full permit application and pursue the regulatory review process exceeds 788 days, or over two years. See D. Sunding & D. Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 76 (2002). The average cost of retaining environmental consultants and preparing and shepherding the application averages over $271,596. *Id.* at 74. Even the general permitting process requires an average of 313 days to complete and costs the applicant nearly $30,000. *Id.* at 74-

76.[5] The Corps' continued expansion of its regulatory jurisdiction will only increase the expense and delay for the regulated public.

Equally disconcerting to *amici* is the increased exposure to civil and criminal liability that results from the decision below. Liability under the CWA's civil enforcement provisions is strict; there is no requirement of negligence, much less of *mens rea*. Thus, the regulatory scheme poses a serious trap for the unwary who are involved in a construction or development project. See, *e.g.*, *United States* v. *Sargent City Water Res. Dist.*, 876 F. Supp. 1081, 1088 (D.N.D. 1992) (civil enforcement action against county, contractor, and engineer for performing or having "responsibility for or control over" drainage repair project); *United States* v. *Board of Trs.*, 531 F. Supp. 267, 274 (S.D. Fla. 1981) (civil enforcement action against community college board of trustees and contractor for stormwater drainage project; civil liability is "strict"); *United States* v. *Weisman*, 489 F. Supp. 1331, 1333-34 (M.D. Fla. 1980) (civil enforcement action against property owner and engineer for construction of road to property owner's home). Landowners and contractors who discharge dredged or fill material without a permit may incur substantial civil penalties, including civil fines of up to $27,500 per violation per day.

The CWA's criminal penalties are even more severe. Negligent violations of the Act carry prison terms of up to one year. See 33 U.S.C. § 1319(c)(1). Penalties increase for

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[5] On the Corps' side of the ledger, the demands posed by the permitting process have increased each year. In fiscal year 1994, the Corps reported receiving over 48,000 applications. *See* Sunding & Zilberman, *supra*, at 76. In fiscal year 2002, the Corps reported issuing 85,445 permit decisions. *See* U.S. Army Corps of Eng'rs, *Regulatory Program Statistics—FY* 2002, at 1, *available at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2002webcharts.pdf (last visited Jan. 2, 2004). The substantial increase in the number of permit applications has directly contributed to the Corps' increasing backlog and delay.

multiple negligent violations, see *id.*, and for "[k]nowing" violations, to include fines of up to $100,000 per day and six years' imprisonment. See *id.* § 1319(c)(2). Moreover, these *mens rea* requirements provide only limited protection, because lower courts have generally not required that a person know his conduct is illegal. Instead, "the government need only prove the defendant's knowledge of the [operative] facts." *United States* v. *Wilson*, 133 F.3d 251, 264 (4th Cir. 1997). The threat of such criminal prosecution is real. Indeed, the government has prosecuted individuals for engaging in construction projects in remote areas comparable to the Deatons' property. See, *e.g.*, *Rapanos*, 339 F.3d at 454 (affirming such a criminal conviction).

In extending these civil and criminal provisions to a broad expanse of the nation's geography, the decision below increases the hazards of everyday decisionmaking for business owners, property owners and contractors. As a general matter, these are ordinary people "using standard equipment to engage in a broad range of ordinary industrial and commercial activities." *Hanousek* v. *United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., with O'Connor, J., dissenting from denial of certiorari). The farther away from truly navigable waters the Corps asserts jurisdiction, the less obvious the applicability of the CWA will be to a layperson. The decision below thus makes it far more likely that a lay landowner or contractor will unwittingly "fill" a "navigable water" and be exposed to liability under the Act.

All of these adverse effects would have been avoided had the Fourth Circuit followed this Court's decision in *SWANCC*. In *SWANCC*, this Court stated that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. This Court therefore held that the CWA grants jurisdiction only over truly navigable waters and

other, limited areas that are "'inseparably bound up with'" those truly navigable waters. *Id.* at 167 (quoting *Riverside Bayview Homes*, 474 U.S. at 134). As the Fifth Circuit held in *Needham*, the Corps' definition and the Deatons' remote roadside ditch do not meet this standard.

II. THE FOURTH CIRCUIT'S DEFERENCE TO THE CORPS OF ENGINEERS IGNORED IMPORTANT JUDICIAL SAFEGUARDS FOR INDIVIDUAL LIBERTY.

Amici recognize that Congress may choose to impose burdens on the public, so long as it acts within its constitutional authority. The question in this case is whether Congress even remotely authorized these burdens. Applying a "one-two combination" of *Chevron* and *Seminole Rock*[6] deference, the Fourth Circuit simply accepted the Corps' theory of its own jurisdiction. In so doing, the Fourth Circuit ignored key safeguards that this Court has set forth to prevent federal administrative agencies from arrogating to themselves the power to encroach arbitrarily on individual liberty.

First, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," this Court will search the statute for "a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. "This requirement stems from [a] prudential desire not to needlessly reach constitutional issues and [the] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. If no clear statement exists, the statute must be narrowly construed. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Corps' assertion of so-called "tributaries" jurisdiction to the tip of remote and insignificant ditches and channels and

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[6] *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

over wetlands "adjacent" thereto pushes the boundaries of Congress' power over the channels of commerce to and beyond its constitutional limits and is not authorized by any clear congressional statement. The Fourth Circuit's decision, although holding otherwise, only confirms that conclusion. Advancing a theory not proposed by any party, the Fourth Circuit first observed that Congress has the power to protect the channels of commerce from "'injurious uses.'" Pet. App. 11a (quoting *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917) (upholding the Mann Act's ban on *interstate* transportation of females for an "immoral purpose")). The court then held that numerous, trivial, intrastate activities such as the Deatons' digging could be aggregated to provide justification for widespread federal regulation. *Id.* at 13a (citing *Wickard* v. *Fillburn*, 317 U.S. 111 (1942)). This search for a supporting constitutional doctrine and ultimate combination of the inapposite holding of *Caminetti* with the aggregation doctrine of *Wickard*—"perhaps the most far reaching example of Commerce Clause authority over intrastate activity" *United States* v. *Lopez*, 514 U.S. 549, 560 (1995)—shows that the Corps' interpretation at the very least "raise[s] serious constitutional problems" and requires clear authorization from Congress. *SWANCC*, 531 U.S. at 173.

Second, the need for a clear statement of congressional authorization "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* The "fundamental purpose" of our system of federalism is to secure individual liberty. *New York* v. *United States*, 505 U.S. 144, 181 (1992); see also *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) ("[I]t was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."); *Gregory* v. *Ashcroft*, 501 U.S. 452, 459 (1991) ("In the tension between federal and state power lies the promise of liberty."). Having experienced first-hand the capacity for the accretion of power in an unchecked

sovereign, the Framers believed that "a healthy balance of power between the States and the Federal Government [would] reduce the risk of tyranny and abuse from either front." *Id.* at 458. This Court has therefore viewed with caution agency attempts to secure new and far-reaching federal powers in traditional areas of state control without clear congressional authorization. See, *e.g.*, *SWANCC*, 531 U.S. at 171-72.

The "dredge-and-fill" permitting program at issue in this case regulates land and water use; and "[t]he regulation of land use is traditionally a function performed by local governments." *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979). This Court has observed time and again that the areas of zoning and land and water use fall well within traditional state authority. See, *e.g.*, *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."); *FERC* v. *Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity."); *Warth* v. *Seldin*, 422 U.S. 490, 508 n.18 (1975) ("[Z]oning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities."). For this reason, this Court held in *SWANCC* that the Corps' interpretation of the very program at issue in this case "imping[ed]" upon "the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. Congress did not authorize the Corps to override this traditional balance. Instead, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources.'" *Id.* at 166-67 (quoting 33 U.S.C. § 1251(b)). Thus, if Congress stated anything plainly in the CWA, it was that the Corps should respect state and local control, not impose federal regulation to and beyond Congress' constitutional power.

There is a square conflict in the circuits on this point that only this Court can resolve. In sharp contrast to the Fourth Circuit's extensive deference, the Fifth Circuit declined to defer to such interpretations of geographic jurisdiction, because "the regulatory definition, if applied [as the agency suggested], would push the OPA to the outer limits of the Commerce Clause and raise serious constitutional questions . . . . [and because] *Rice* and *SWANCC* have rejected such an expansive reading of the OPA and CWA respectively." *Needham*, 2003 WL 22953383, at *5 n.8.

Wholesale deference to the Corps' interpretation of the CWA was also inappropriate because the statute carries criminal penalties. Under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [a court should] choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987). This ensures that "'fair warning [is] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *United States* v. *Bass*, 404 U.S. 336, 348 (1971). In addition, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community," this rule ensures that "*legislatures* . . . define criminal activity." *Id.* (emphasis supplied).

Congress never anticipated or intended that the CWA would be applied to make potential criminals out of ordinary landowners like the Deatons. And nowhere in the CWA is there a clear statement authorizing the regulation of roadside ditches under the rubric of "tributaries." Even the Fourth Circuit concluded that one "cannot tell from the Act the extent to which nonnavigable tributaries are covered" at all. Pet. App. 17a. The rule of lenity therefore required the court to construe the Act narrowly, to avoid turning countless developers and contractors into inadvertent criminals. Cf. *Hanousek*, 528 U.S. at 1103 (Thomas, J. dissenting from

denial of certiorari) ("[W]e should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations.").

Finally, the Corps' claim of jurisdiction over non-navigable roadside ditches simply lacks the "'thoroughness,'" "'validity'" and "consistency" required to merit judicial deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001). Indeed, the Corps' current jurisdictional theory arose merely as a litigating position over a decade after the Deatons first moved earth on their property. Before the advancement of its current theory, the Corps' published pronouncements were at best ambiguous, and appeared to disavow entirely CWA jurisdiction over ditches.[7]

Jurists have properly expressed discomfort with the Corps' mode of decisionmaking, with regard to federal jurisdiction generally and ditches specifically. A panel of the D.C. Circuit reviewing the Corps' decade-long struggle to assert jurisdiction over "incidental fallback," (the dirt that dribbles

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[7] The Corps' earliest regulations identifying drainage ditches "excluded" them from jurisdiction. *See* Interim Final Rules for Regulatory Programs of the Corps of Engineers, 40 Fed. Reg. 31,320, 31,321 (July 25, 1975). The Corps' 1977 regulations expressly stated that "manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States." Final Rule for Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). That statement disappeared from the regulations in 1982, *see* Interim Final Rules for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794, 31,811 (July 22, 1982), but reappeared in the preamble to the Corps' 1986 regulations with an ambiguous qualifier. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (stating that "Non-tidal drainage and irrigation ditches excavated on dry land" are "generally . . . not consider[ed] . . . to be 'Waters of the United States'"). In 2000, 10 years after the Deatons first attempted to build on their property, the Corps continued to disavow jurisdiction over "ditches constructed entirely in upland areas." 65 Fed. Reg. 12,818, 12,823-24 (Mar. 9, 2000).

from the side of a shovel as it is lifted out of the ground), declared that the "overriding purpose" of the Corps' regulation "appear[ed] to be to expand the Corps's permitting authority." *National Mining Ass'n* v. *United States Army Corps of Eng'rs*, 145 F.3d 1399, 1405 (D.C. Cir. 1998). Rejecting the Corps' unilateral assertion of jurisdiction over a type of agricultural plowing, the Ninth Circuit's Judge Gould described the Corps' radical expansion of authority without explicit congressional authorization as "an agency power too unbounded." *Borden Ranch P'ship*, 261 F.3d at 821 (Gould, J., dissenting); see also *United States* v. *Newdunn Assocs.*, 195 F. Supp. 2d 751, 767 (E.D. Va. 2002) ("While expanding its authority through new regulations may be more expedient than convincing Congress through properly enacted legislation, it is not permissible for the Corps to take a shortcut by continually redefining regulatory terminology and therefore its own jurisdiction."), *rev'd*, 344 F.3d 407 (4th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-637).

Even after this Court's decision in *SWANCC*, the Corps' overriding focus has been to seek the broadest possible geographic jurisdiction without regard to Congress' actual intent. In the weeks after the *SWANCC* decision issued, the Corps and EPA issued a joint memorandum to field personnel describing the Court's holding as "limited" and asserting authority "to assert CWA jurisdiction over, *inter alia*, all of the traditional navigable waters, all interstate waters, and all tributaries to navigable or interstate waters, *upstream to the highest reaches of the tributary systems*, and over all wetlands adjacent to any and all of those waters." Memorandum from Gary S. Guzy & Robert M. Andersen, Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters 6-7 (Jan. 19, 2001) (emphasis supplied), *available at* http://www.epa.gov/owow/wetlands/swancc-ogc.pdf. On January 15, 2003, two years after this Court's decision rejecting the foundation for the Corps' jurisdictional regulations, the agency finally

issued an Advance Notice of Proposed Rulemaking "request[ing] public input on issues associated with the definition of 'waters of the United States' and also solicit[ing] information . . . on the implications of the *SWANCC* decision for jurisdictional decisions under the CWA." 68 Fed. Reg. 1991, 1991 (Jan. 15, 2003) (the "ANPRM"). The ANPRM announced the Corps' and EPA's intent to "develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction." *Id.* But on December 16, 2003, the same day that the Fifth Circuit issued its decision in *Needham*, the Corps and EPA "announced that they would not issue a new rule on federal regulatory jurisdiction," even "over *isolated wetlands*," and abandoned the rulemaking altogether. Press Release, EPA, EPA & Army Corps Issue Wetlands Decision (Dec. 16, 2003) (emphasis supplied). As a result, rather than give this issue the careful, public consideration it warrants, the agencies apparently will continue their efforts to expand their jurisdiction through *ad hoc* guidance memoranda and case-by-case field application, constrained only by the supervision of the courts. In light of the hands-off approach embraced by the Court of Appeals in this case, only review by this Court will ensure that judicial supervision of the Corps is meaningful.

III. THE COURT SHOULD GRANT THE PETITION TO RESOLVE CIRCUIT SPLITS REGARDING THE SCOPE OF FEDERAL JURISDICTION UNDER THE CLEAN WATER ACT AND THE APPLICATION OF *CHEVRON* DEFERENCE TO IMPLEMENTING AGENCIES.

The Fourth Circuit's decision is irreconcilable with two decisions from the Fifth Circuit. The Fourth Circuit below deferred to the Corps' claim of jurisdiction over "any branch of a tributary system that eventually flows into a navigable body of water," including "a roadside ditch." Pet. App. 2a, 20a. The Sixth Circuit adopted this approach and aggravated the split. See *Rapanos*, 339 F.3d at 452-53.

In the Fifth Circuit, by contrast, "a body of water is subject to regulation . . . if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. In *Rice*, the Fifth Circuit rejected jurisdiction over an "intermittent stream[]," because "there [wa]s nothing in the record that could convince a reasonable trier of fact that [the stream was] sufficiently linked to an open body of navigable water as to qualify for protection." *Id.* at 270-71. The Fifth Circuit recently reaffirmed this standard and expressly rejected both the scope of jurisdiction and the deference afforded the agency in the Fourth Circuit's decision below. See *Needham*, 2003 WL 22953383, at *3 & *5 n.8 (describing the definition approved in *Deaton* and *Rapanos* as "unsustainable under *SWANCC*" and holding that "the regulation is not entitled to *Chevron* deference"). According to the Fifth Circuit:

> The CWA and the [Oil Pollution Act] are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. *See Rice*, 250 F.3d at 269. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, *roadside ditches* and the like . . . .

Id. at *3 (footnote omitted and emphasis supplied). See also *id.* at *5 n.12 ("[I]ncluding all 'tributaries' as 'navigable waters' would negate *Rice's* adjacency requirement, and extend the OPA beyond the limits set forth in *SWANCC*."). The positions of the Fourth and Fifth Circuits regarding the scope of geographic jurisdiction under the CWA and the deference due the implementing agencies cannot be reconciled without the intervention of this Court.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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